Family Law: Evolution Or Revolution?

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Address to the National Family Law Conference

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Thank you very much indeed Mick. Can I acknowledge you as the Chair of the Family Law Section and members of the executive of the Family Law Section. The Chief Justice of the Family Court; the Chief Judge of the Federal Circuit Court, and may I congratulate you on what was a powerful and persuasive speech on the issue of commercial surrogacy; other distinguished guests, ladies and gentlemen

**Introduction**

To start by tackling head on the theme of this conference: I think that it can be taken as proven that the introduction and passage of the Family Law Act some forty years ago was a revolution in Australia’s social and legal landscape.

Central to the new Act, or what was then the new Act, was its focus on children’s welfare. Four decades later, and a social and jurisprudential world away from the time the Act commenced, it is easy to forget how transformative this was. Previously, the focus of family law had been very much on regulating marriage and divorce. The new Act put children’s well-being at the forefront, as well as providing mechanisms for dealing with the financial consequences of marriage breakdown.

From a systems perspective, the Act made family law national and consistent across most jurisdictions. This, too, was a marked change.

Since that time, family law has undergone further significant reforms. It has responded to emerging challenges and developed to reflect the expectations and attitudes of our diverse Australian community.

Not, however, being greatly enamoured of revolution for its own sake – or, for that matter, of hyperbole - I would venture to characterise those developments in the years since the Family Law Act as symptomatic of evolution, rather than revolution. That is no bad thing.

This is, after all, an area of law which has, as a foundational principle, the welfare of some of the most vulnerable members of our society. It is an area of law which is highly contested in its
jurisprudence and the social science which underlie it, and in the practical application of that jurisprudence and that social science.

Sometimes, revolution is necessary and called for. However, the turmoil, turbulence and disruption characteristic of most revolutions tell us that they should not be lightly embarked upon. Rather, measured change, based on rigorous research and respectful and constructive debate, is a better way forward. It is certainly a more prudent path to tread, bearing in mind the vulnerability and fragility of those whose interests are so much at stake, in particular children.

The wisdom of that approach is illustrated by the incremental way in which the paramountcy of children’s interests have been solidified in the years since the Family Law Act commenced.

The best interests of children, the protection of children from harm, and shared parental responsibility, have become core principles of family law as they ought to be. A strong emphasis on the interests of children has been enshrined in Australian family law since at least 1976. It was further reinforced in 1990 when Australia ratified the Convention on the Rights of the Child. One of the main principles on which that Convention is based is the obligation to have regard to the best interests of the child as a primary consideration in all relevant decision-making. By ratifying the Convention, Australia committed itself, on the world stage, to respecting and upholding that principle.

Today, Part VII of the Act elevates the best interests of the child to ‘paramount’ status in several provisions. It makes clear that when a court has decided to make a parenting order in relation to a child, the best interests of the child must be regarded as the paramount consideration.

While that basic principle has remained relatively unchanged, the management of family law disputes has evolved, with the introduction in 2006 of routine dispute resolution in parenting matters, and the family law services programme.

The Howard Government’s landmark establishment of 65 Family Relationship Centres, from July 2006, was central to achieving the required cultural shift in the family law system from litigation, never an ideal model for the resolution of such disputes, and towards separated parents
making their own decisions and arrangements for their children with relatively minimal state intervention.

The changes were consciously directed towards children’s best interests. They recognised that many disputes over children following separation are really about relationship issues rather than presenting a legal problem, and were more often than not better suited to community-based interventions.

The Family Relationship Centres are gateways to the family law system, primarily because of their visibility, their community acceptance, and their accessibility.

In 2013-14, the Centres saw more than 91,000 clients. They accessed the range of support available through the Centres, including information, referral to other services, and family dispute resolution. In that year, the suite of family law services, including those provided by Family Relationship Centres, helped more than 285,000 clients. Those figures have increased each year since Family Relationship Centres were instituted.

There are more than 1,750 Family Dispute Resolution Practitioners accredited to provide family dispute resolution to help parents sort out their own arrangements for their children. This is an important success story within the evolution narrative which I am advancing today.

The Abbott Government will continue to enhance the family law system to meet emerging challenges. These include, for example, changes in family formation, the growing global mobility of families and demographic changes within our community, as well as the profiles of people who enter and use the system. Ongoing financial pressures across all aspects of government will also mean the family law system must continue to innovate.

Against that background, I want to mention this morning some recent and upcoming work directed towards the healthy evolution of the family law system.

**Family Law Council - New Terms of Reference**

I am pleased to announce that I have recently given the Family Law Council of Australia a new reference. That reference emerges from the recognition that many families seeking resolution of parenting disputes face not merely a family law issue. More commonly, they are struggling with
a multiplicity of problems, of which the family law issue is simply one facet. Sometimes, they might not recognise that they have a legal issue; conversely, families might mischaracterise a communication or trust issue as a legal issue.

Characteristic co-morbidities include mental health problems, misuse of addictive substances, emotional, sexual and physical abuse, neglect, financial distress and violence.

For those reasons, the family law system should continue to evolve to become a more integrated system, which acknowledges and addresses the diverse needs of Australian families which come into contact with it, and which brings to bear a multi-disciplinary approach.

Significant work has already been undertaken by the family law courts, states and territories, and my Department, and other interested bodies, to improve collaboration between the family law system and the state and territory child protection systems.

This has focussed, to date, on improving the interface between the family law courts and the child protection systems.

These initiatives have produced several benefits. An emphasis on fostering relationships between personnel in the courts and in the child protection systems has delivered better shared understanding of the respective roles that each plays in protecting children. Information sharing has improved, and best practice frameworks for case management and risk identification have been implemented.

It is against that background that I am announcing the terms of the new reference to the Family Law Council.

The first aspect of the reference asks the Council to consider whether any systemic changes could enable easier transfer of proceedings between the family courts and children’s courts, and the possible benefits of family law courts exercising the powers of the relevant children’s courts, and *vice versa*.

The second aspect of the reference asks the Council to focus on improving collaboration and information-sharing between the systems – particularly to better assist those with complex needs.
Accordingly, the Family Law Council will explore opportunities for greater collaboration and information-sharing within the family law system, such as between the courts and family relationship services, as well as with other relevant support services, such as child protection, mental health, family violence, drug and alcohol, Aboriginal and Torres Strait Islander and migrant settlement services.

This reference will bring to bear Council’s considerable knowledge and expertise on a multi-faceted issue that continues to challenge us in our shared objective of protecting children and supporting families. I expect that the Council’s exploration of this reference will play an important role in identifying opportunities to equip the family law system to assist those with complex needs. It will be a significant body of work and a significant extension of earlier and continuing work on this issue. I look forward to receiving Council’s report at the end of next year.

**Family Law Council’s report on Parentage**

I would also like to take this opportunity thank the Family Law Council for its thoughtful and comprehensive Report into Parentage under the Family Law Act, and acknowledge the considerable work and expertise of the Family Law Council in conducting that inquiry.

The Family Law Council, as you know, was tasked with identifying if any amendments should be made to the Family Law Act to ensure consistent and appropriate outcomes for children. As an aside, I’d like to point out, following some erroneous media commentary, the terms of reference did not ask the Council to consider surrogacy. Although as I said at the start of these remarks, I listened with respect to John Pascoe’s observation and I’ve noted his call for a Commonwealth inquiry.

The Council’s report on parentage is a valuable contribution to this complex area of legal and social policy. The Government is now considering, with the care and deliberation demanded by such a complex issue, the recommendations made by Council in this difficult area.

**Five Year Agreements for Family Relationship Service Providers**
Let me turn to the five year agreements with Family Relationship Service Providers which commenced on 1 July. The Government has committed more than $870 million over the life of those agreements.

I acknowledge that the Government’s decision to impose an indexation pause on funding programmes, including for family law services, was an unwelcome one. Regrettably, it was also a necessary element in fulfilling this Government’s promise to the Australian people to repair the Budget. All aspects of Government spending have needed to bear some share of the pain. This was not a choice that we were able to make. It was a choice that was forced on us.

The new five year funding agreements will offer the service providers longer term certainty. They will also provide flexibility to vary agreements, enabling the agreements to reflect future changes in circumstances and changes in our community. We encourage providers to identify changing or emerging needs, and develop promising practices.

With that in mind, I have asked my Department to scope work to identify how the future needs of the Australian community for family law services might best be met sustainably over the long term. This research follows from the 2013 Allen Consulting Group report on family law services.

Overall, that report which I’m sure you are all familiar, found that the services were relevant, adaptive and effective in meeting the needs of separating or separated parents and their children. However, there is a need for more flexibility to help clients with complex needs including, in particular, cases involving family violence, mental health issues and substance abuse.

These findings will inform our next stage of work to expand the evidence base on changing demographics, and explore partnership and collaboration opportunities, as well as alternative funding models.

**Enhancing the evidence base**

As I mentioned earlier, the Family Law Council’s work has been, and will be, an important contribution to enhancing the evidence base supporting family law policy and programmes.
I would like also thank and acknowledge other all other researchers, academics, professionals and organisations who contribute in this domain. In particular, I want to acknowledge the important work of the Australian Institute of Family Studies in its recent Longitudinal Study of Separated Families entitled *Post-Separation Parenting, Property and Relationship Dynamics after Five Years*.

That research provides a crucial understanding of those who use family law system, the dynamics of families, pathways taken through the system, and how and why the system is used to divide property.

My Department has also commissioned the Australian Institute of Family Studies to examine the impact of the family violence amendments to the Family Law Act. Some of you may have already contributed to this research. Stakeholders surveyed for this work include judicial officers, lawyers, family dispute resolution practitioners and staff in Family Relationship Centres, and post-separation support services. I would like to thank those of you who have given your time and expertise to this important research. I expect the evaluation to be completed by mid-2015, and I look forward to receiving the report.

I am anxious, too, to hear the voices of practitioners across the diverse range of disciplines committed to supporting Australian families. I have asked my colleague, Ms Sarah Henderson MP, the Member for Corangamite, who has taken particular interest in this area of policy, to assist by hosting a series of informal events. Sarah, as I say, has quite an interest in this area and will bring to this work not only her focused intelligence, but great insight and energy.

These events which she will host will be fora for free-flowing discussion of how systems and procedures can be improved. The first of these was held last week, at the Waterfront Campus of Deakin University. I would like to thank its participants for their willingness to attend and engage in what was a constructive discussion.

Let me now turn to mention some other work that is at an early stage of development.
Binding Financial Agreements

Let me start with the subject of Binding Financial Agreements. Government must continue to look at ways to make easier, and more attractive, to resolve family law disputes outside of the courtroom setting. This serves families by minimising opportunities and incentives for entrenching disputes and enabling a ‘clean break’, to everyone’s benefit.

The value of giving separating couples the ability to reach their own agreements has been long recognised – it is one of the strengths of our modern family law system. Many families are able to negotiate separation or divorce with little or no assistance. Recent Australian Institute of Family Studies research shows that over 75 per cent of families sorted out their parenting arrangements in this way without the need for other intervention.

However, several recent cases have highlighted uncertainty surrounding Binding Financial Agreements. I would like to acknowledge the work of the Family Law Section in assisting the Government to identify those issues.

The Government will continue to listen to, and engage the sector, particularly the family law sector, as we identify what is required to ensure that Binding Financial Agreements can be used with confidence, and devise appropriate reforms to enable that to occur.

Better support for parenting orders

I want to mention as well better support for parenting laws. The Abbott Government will look at ways to improve court processes to more fairly and efficiently assist families. And to that end I have asked my Department to undertake a scoping study into the use of short trials to deal with disputes relating to variation and contravention of parenting orders. This is a concern across the profession - and in the broader community.

I acknowledge work already underway on this important issue in the Brisbane Registry of the Federal Circuit Court by making better use of Registrars in contravention matters. I also acknowledge the work of the Family Court and the Federal Circuit Court’s working party on self-represented litigants, which have explored the issue as well. That work will contribute to the Government’s thinking about how a short trial system to deal with contravention could take shape.
Legal assistance reforms

Finally, I would like to mention reforms underway in related areas – legal assistance and federal courts.

A large proportion of Commonwealth legal assistance funding is directed to family law matters. Last year, legal aid commissions spent 83 per cent of Commonwealth funding on family law matters, and community legal centres spent 32 per cent of Commonwealth legal assistance funding on family law matters. That equates to roughly $180 million each year. Based on those figures, you might say that legal aid is the largest family law practice in Australia.

My Department has been working closely with states, territories and legal assistance service providers, to develop reform options for legal assistance which will ensure that resources are directed where they are most needed, that includes increased coordination, collaboration and a focus on better planning of front-line delivery of services.

In June this year, I released the review of the National Partnership on Legal Assistance Services. It supported various reforms to improve the way legal assistance is delivered to vulnerable people.

The Productivity Commission inquiry on access to justice arrangements will be tabled shortly and, with the report of the NPA Review, will inform discussion and decision-making about future legal assistance arrangements.

The upcoming reforms provide an opportunity to link these services to more effectively assist people to navigate the system, while recognising the important complementary roles of different service providers in the family law system.

Court reforms

Finally, let me turn to the topic of court reform. As has been widely reported, the Government has under consideration opportunities to improve the financial position of the Family Court and the Federal Circuit Court.
It would have come to your attention that the media has reported on the findings of a KPMG review into the performance and funding of the federal courts.

Articles in The Australian have claimed that the ‘three federal courts are in a dire financial position’, in part due to the impact of the efficiency dividend and other pressures. It is true that the financial positions of the Family Court and the Federal Circuit Court are projecting deficits, and it is incumbent on the Government to review the factors which may have led to this situation.

To this end, the Government undertook the KPMG review in close consultation with the courts, to better understand the drivers of courts’ performance and the impact of the existing funding arrangements.

The review included some discussion of options for reform, canvassing matters including shared administration and structural changes, court fee restructure and retention, improved case management, and mandatory mediation for property and family disputes.

The National Commission of Audit report also considered whether efficiencies could be derived from reforms to court structure. The Commission recommended that the Family Court and Federal Circuit Court back office functions should be merged with the Federal Court, to reduce duplication of costs in the delivery of services across the three federal courts.

I am certainly interested in exploring efficiencies through changes to administrative arrangements. However, changes must recognise the independence of each court, under Chapter III of the Constitution, a point I have been at pains to stress to the Heads of Jurisdiction, in which the Heads of Jurisdiction acknowledge and welcome.

I am also considering a broad range of options and opportunities for improving the financial position of the family courts, including the options presented in the KPMG review and the Commission of Audit report.

As with all issues affecting courts, I will continue to develop policy in close consultation with the Heads of Jurisdiction.
**Conclusion**

Let me say in conclusion that this conference, your sixteenth, provides an outstanding opportunity to explore and contribute to the ongoing evolution of family law and related disciplines, through the sharing of research, evidence and experiences.

Of course, there will be different views expressed, and I urge you to express them so that we can maintain and improve a vigorous, strong foundation for the next stages of family law’s evolution, if not revolution.